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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v. 24 Civ. 3973 (AS)

LIVE NATION ENTERTAINMENT, INC., *et al.*,

Defendants. Conference (Remote)
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New York, N.Y.
November 8, 2024
11:44 a.m.

Before:

HON. ARUN SUBRAMANIAN,

District Judge

APPEARANCES

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
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BY: JUSTIN BERNICK, ESQ.

(Case called)

THE COURT: Let's proceed on what I understand are the couple of issues that we are here to address.

First, on the amendment to the protective order, the Court has reviewed the parties' proposals and it will adopt the plaintiffs' proposal, which is Exhibit B to the parties' joint letter. And just cutting to the chase, to the extent that the defendants want in-house counsel to be able to review the information at issue, as the Court sees it, there are two options that the defendants have. One is the option that's in the protective order as it stands, which is that for confidential information, they are permitted to designate in-house counsel to review that information subject to some limitations. Now I understand that the defendants want Mr. Wall and his colleague that was previously identified to be the designated in-house counsel and the prohibitions that come along with the designation would not fit for those two individuals, but that doesn't explain for present purposes why a competent and trusted in-house lawyer for the defendants——and the Court is sure that there are many——can't fulfill the function of making sure that defendants' in-house legal team is apprised of the details of the documents that we're talking about here today, and Mr. Wall is surely not the only person who can handle that function. There are likely many other people in the in-house legal department who could handle that

particular function. But even if the defendants really wanted Mr. Wall and his colleague to be able to review this information, then it seems that they should be able to talk with the producing parties to de-designate the information that's at issue. At a basic level, the limited information that defendants seek to disclose to their clients doesn't seem to the Court to itself be confidential or highly confidential. Indeed, it's about what the defendants themselves allegedly did or said. The problem is that the information appears in documents that contain other things that should be maintained confidential under this Court's protective order. So just go and have the information that you want to disclose de-designated, and if you can't reach agreement, then the Court will step in. The producing parties should be reasonable in their discussions with the defendants because if the Court starts looking at documents——and I am fully ready to look at as many documents as you want me to look at——and the Court gets the sense that nonconfidential information was just bulk-tagged as confidential or highly confidential, then the Court may simply bulk de-designate documents presented so that they can be furnished as nonconfidential documents. So be reasonable in your discussions with the defendants so that any truly nonconfidential, nonhighly confidential information can be freely disclosed.

Now the defendants complain that having to go document

by document to have documents de-designated would be unduly burdensome. There's been no actual showing of burden to date, and of course defendants can simply bullet out in a memo or an email the information that they believe is not either confidential or highly confidential, and if there are disputes, again, the Court will resolve them.

Now the Court on its own at the last conference raised potential work product issues. That wasn't something that the parties or anyone raised, but the Court raised it. As to that concern, if the defendants are simply pointing to information across numerous documents and telling the other side or the producing third party that they don't think that information fits the definition of confidential or highly confidential information under the protective order, then that doesn't raise any work product concerns, and in the normal course of discovery, parties inevitably reveal to the other side the documents and information they are most concerned with. That's just how discovery works. So the defendants can simply flag for the producing party those excerpts of documents that they believe should be de-designated, and again, if the parties and third parties can't resolve any issues on their own, just bring those disputes to the Court.

But the Court expects that the parties and everyone on the line can figure out a creative way to streamline this process——for example, as I said, a memo simply extracting the

information that the defendants want de-designated, leaving out all the sensitive, confidential information and identifiers that the plaintiffs and third parties are concerned with, and once de-designated, there would be no issue with furnishing that information to Mr. Wall or anyone else working for the defendants who need to see it.

So for those reasons, the defendants' motion to amend the protective order is granted in part. We'll put in the amendment, and that will be reflected on the docket.

With that, I think I should at this point turn to Mr. O'Mara to address any outstanding issues on search terms or custodians. So Mr. O'Mara, if you're on the line.

MR. O'MARA: Your Honor, this is Tim O'Mara. I actually think that the plaintiff might want to start here rather than I.

MR. THORNBURGH: Good morning, your Honor. This is John Thornburgh for the United States. I'm happy to start, if that's all right with you.

THE COURT: Of course. Proceed.

MR. THORNBURGH: All right. Thank you.

So, you know, we've been working with defendants I think, you know, quickly and in good faith on trying to resolve the outstanding discovery issues. I think we've made some progress. You know, from plaintiffs' perspective, there are two issues, two important issues that remain outstanding for

which we can, you know——we appreciate the Court's guidance.

So the first one is on search terms and custodial document negotiations. So we have worked diligently over the last few weeks to provide defendants with revised search term proposals, you know, each one of which was narrower and less burdensome than the one before it. We've also incorporated proposed changes from defendants to try to reduce the document hit count and reduce their burden. Our most recent proposal, you know, decreased the number of documents that hit on proposed search terms by nearly a million documents, and so we think we've made good progress to try to address defendants' burden concerns and also taking into account the guidance we got from the Court last week. Late last night, at around 11 p.m., we received a counterproposal from defendants, and, you know, frankly we were just surprised by that proposal because, after you kind of look under the hood, so to speak, it seems likely that defendants' proposal would result in defendants reviewing significantly less than the 1.5 million document cap that the Court rejected just last week. So, you know, we think that our proposed search terms are reasonable as they stand. We're willing to make additional modifications to address specific concerns that defendants have about, you know, a few search terms hitting on too many documents, but given the Court's guidance last week that the Court was not going to, you know, cap the number of documents that defendants have to

review, we don't think that defendants' proposal that they provided last night——which, again, after you look under the hood would likely result in defendants reviewing less than 1.5 million documents——is a reasonable path forward here.

THE COURT: Okay. Well, look, I said there was no cap, but to the extent that the proper application of search terms would yield fewer than 1.5 million documents, that is what it is too. I mean, the point was that it would be improper to judge relevance and proportionality based purely on a document count. You're supposed to judge these issues based on the actual substance; so how reasonable are the search terms, you know, which custodians should they go to, all of those concerns, that's how you're supposed to figure it out. I'm less concerned with the number of documents as being the touchstone of Rule 26 proportionality. I don't think there's anything in the rules or any case that suggests that it's a numbers game. So, I mean, look, I'll hear from Mr. O'Mara, but we can just do this sort of baseball arbitration; you can just send me your search terms and I'll just pick one of them. Or if there's another proposal, I'm happy to do it. But it seems like you're working on it. And do you think that there's daylight, do you think you can try to resolve this with defendants, or do you think, nah, it's not going to work because we're so far off in those proposals and counterproposals that no one's going to be able to figure this

out?

MR. THORNBURGH: You know, your Honor, we thought as of yesterday, before we got defendants' proposal, that we were nearing an agreement. As I've said, we've made significant revisions to the search terms incorporating, you know, proposed edits from defendants. You know, one of the issues here I just want to raise for the Court to understand is, defendants continue to raise burden concerns about how many documents will be captured by the custodial collections in the search terms.

THE COURT: Yes. What's the hit count on your search terms?

MR. THORNBURGH: Plaintiffs' search terms, your Honor?

THE COURT: Yes. The last hit count we got was yesterday, 7.1 million.

MS. GUSHMAN: Your Honor, this is Robin Gushman for defendants. I just want to clarify something with respect to that count.

So the 7.1 million document count takes into account the documents that have been collected thus far, which includes primarily system emails. We've explained this to defendants. We are still in the process of collecting additional emails from custodians, so that count is likely to increase significantly, potentially by millions of documents.

THE COURT: Okay. And I'm sorry. What was your name again?

MS. GUSHMAN: Robin Gushman.

THE COURT: Ms. Gushman, can you just walk me through that. Okay. I know that you disagree that it's actually 7 million, you think it's more, but let's say it's 7 million. So then just, if you can, in like a couple sentences, so you get those 7 million documents, you load them on Relativity or whatever platform you're using, and then what happens next? What are you doing to then review those documents for production?

MS. GUSHMAN: Your Honor, our proposal is to use Technology Assisted Review, so what that would entail would be reviewing an initial set of documents, reviewed by outside counsel to determine responsiveness of those documents. That review will start to train a TAR model to understand what documents are likely responsive and what documents are likely not responsive. That TAR model will filter the most likely responsive documents to the top of the review, and we will continue to review, using contract reviewers to do the initial pass, those likely responsive documents, until we hit a certain recall rate. And the recall rate is essentially the estimated percentage of responsive documents out of all responsive documents in the set that have been identified through this TAR process. So for example, if you choose a 70 percent recall, that means that when you hit 70 percent recalls, you've identified 70 percent of the responsive documents in that

population, and at that point you cease the review and you produce the responsive documents that you've identified through that set. So the number of documents that you review to get to that point obviously depends on what the recall rate is, what the richness of the population is, how responsive the documents are, and of course how many total documents there are in the overall population.

THE COURT: Understood. So the number may be higher, but based on what you just told me, you're not actually going to be reviewing that total set of hits because the way the model works is, it tells you when you're getting to the point where everything left is garbage, and at that point, you're like, okay, what's left is probably not going to be responsive, and so you're proceeding on that basis. So the number will be lower, but I just wanted the context. Is what I said more or less right?

MS. GUSHMAN: Your Honor, that is more or less right. I will clarify, of course, that if the, you know, the initial document population is, for example, 14 million documents, you'll be reviewing a significant number of documents in order to reach that recall rate, but it's correct that you would not be reviewing every single document in that population.

THE COURT: Okay. And Ms. Gushman, are you prepared to address the proposal/counterproposal issue, or is there someone else on your team that is handling that?

MS. GUSHMAN: Yes, I'm prepared to address that.

Just one comment on Mr. Thornburgh's note that they had significantly decreased the population through revisions to search terms. We respectfully disagree with that. Their initial search terms population returned 7.8 million documents. We took the search term hits on that, organized them by highest-hitting terms, and then we proposed edits to reasonably streamline and eliminate and narrow terms that were inherently overbroad. So for example, there was one term, "'revenue' within 15 of 'ticket,'" that hit on over 730,000 documents in itself, so we proposed edits to narrow terms like that. We also asked plaintiffs to include qualifiers to narrow certain of those search strings to clarify why certain of these terms are actually relevant.

On the next term, plaintiffs rejected most of these proposed revisions, and the next set of search strings yielded about 7.1 million documents. So that's the latest hit count that we've been discussing. We again proposed revisions to narrow this set. This still included overbroad terms. For example, one string that contains the term "'fee' within 10 of 'ticket'" that hits on over 2.1 million documents. And again, as I noted previously, this number will significantly increase after we finish collections. The counterproposal that Mr. Thornburgh referenced takes into account the search term edits that we proposed. It also proposes to narrow the

document population based on the type of document that is searched. So to clarify that, plaintiffs have agreed that it is appropriate to search only emails and attachments and what are called modern attachments, which are essentially documents that are linked in emails. They've agreed that it's appropriate to search that limited set of document sources for certain custodians and for certain time periods. What we have proposed is to search all custodians for that type of document, so emails, attachments, and modern attachments, as well as texts and chats for certain time periods and certain custodians. So that is what has reduced the document count. We believe that limiting to that set of document types is reasonable. The most relevant material will be found in those document types. That is evidenced by the fact that the deposition exhibits that were used during the investigation, as well as documents referenced in the complaint, were, for the vast majority, pulled from emails, attachments, texts and chats, and the modern attachments, which are the links in the emails, will give plaintiffs access to certain shared sources as well.

THE COURT: Got it. That's very helpful, although I will say that that entire discussion gives me some PTSD from my days in private practice, so I commend you for having to work through all of these issues with the plaintiffs here. This process, at this point, have the duplicates and near duplicates

already been taken out, or is it that you can't really do that because at this point we're taking the full volume of documents and applying the search terms to it and so the number could be lower or higher, just we haven't done that process, you can't feasibly do it at this point?

MS. GUSHMAN: Your Honor, we have de-duplicated across custodians and across the documents that have been collected thus far. It's possible that documents that are forthcoming in the collection we're working on will, you know, be duplicates of what's already in the collection, but the search term hits account for de-duplication.

THE COURT: Okay.

MR. THORNBURGH: Your Honor——sorry——just one comment on that, which is, you know, plaintiffs have agreed——despite our ESI order contemplating something different, we've agreed to allow defendants, in their review of documents, to utilize email threading, which defendants have acknowledged will reduce the document universe by 10 to 15 percent, and that implementation has not yet occurred, so I just want to point out that, you know, that implementation will significantly reduce the number. And as your Honor pointed out earlier, you know, we can estimate the number of documents that defendants' reviewers would have to review, based on, you know, the responsiveness rate of documents the defendants have already reviewed, and the defendants told us, you know, on Monday that

the review thus far for documents that were left over from the investigation indicate, you know, a 37 percent responsiveness rate. So if TAR is automatically prioritizing the most likely responsive documents and you also use email threading, what you're really looking at for defendants' review is probably about half of whatever the document hit count is, and, you know, we acknowledge that we don't have a full picture of what the total document universe is, but we don't think it's, you know, two times what the current hit count is, and, you know, it's difficult for us to understand what that number would be because defendants have not finished those collections. So even though defendants have not finished those collections, we're trying our best to estimate what those would be, given all these other variables that are in play.

THE COURT: Understood. Okay. So just to help me out, in terms of the hit report, it goes term by term and explains the number of hits, right? It's just like a kind of Excel document; is that right?

MS. GUSHMAN: Your Honor, the hit reports are term by term, but the way that plaintiffs have proposed their search terms, they're in search strings, so it's kind of individual terms combined together in each row. It is possible to deconstruct those, but it takes significant machine time.

THE COURT: No, no, no. I understand. Yeah, no. I meant just literally.

Here's what I'm going to propose. You should keep working on it. It seems like there's probably still some wiggle room on both sides. Take until this coming Wednesday, and if you haven't reached an agreement, then each side can just email to the Court where they are in terms of their proposal or counterproposal and the Court will figure out which search terms will be applied. And as you might expect, neither side may be happy with whatever the Court does, but I think the show needs to get on the road, so let's do it that way, unless the parties have a different suggestion.

So Mr. Thornburgh, does that seem acceptable on your side? Because you need to start getting documents in and start reviewing them. So while in a perfect world, with infinite governmental resources, you may want to sit there and go through like millions and millions of documents, it might be worth your time to just see if you can tighten up these search terms to really focus on what's going to be most centrally relevant here. And then Ms. Gushman, on your end, if you're being a little bit too, you know, stingy on some of these terms, you might want to expand them just a little bit, understanding what Mr. Thornburgh said, which is that given the TAR protocol, the number of documents you're actually reviewing might be lower. But the parties are free to take the positions that they're going to take, and by Wednesday, just submit them in, and then if there are disputes, we'll resolve them, and

we'll send you back the search terms.

Ms. Gushman, or either side, whoever wants to chime in on that, if there's any other suggestion, happy to hear it.

MS. GUSHMAN: Thank you, your Honor. That all makes sense. Just one logistical question for the filing next Wednesday. Is that an actual filing or would you prefer that by email?

THE COURT: You just do it by email. I don't know that the media is going to be terribly interested in the search terms that either side is proposing to be reviewed here.

MS. GUSHMAN: Thank you, your Honor.

THE COURT: Okay. Mr. Thornburgh, any further issues to address or does that pretty much cover it in terms of what we needed to handle today?

MR. THORNBURGH: Your Honor, at the risk of asking you to get too much more into the nitty gritty of document review, I will say, you know, the parties have been working on a TAR protocol, which obviously relates to all these issues we were just discussing. I think, you know, the key question that is outstanding there is, it relates to the recall rate, which defendants' counsel, you know, described to you earlier. And, you know, typically, in a TAR protocol process, the recall rate is calculated——again, the recall rate is estimating how many documents, how many responsive documents the TAR protocol has correctly identified as a percentage of all responsive

documents in the total document universe; so essentially trying to make sure the TAR protocol is accurately or sufficiently capturing responsive documents. And typically in a TAR protocol, you know, that recall rate is calculated by looking at the entire document universe, so all the documents collected. Here, defendants have indicated they want to use search terms, which obviously we've been discussing and negotiating and we are amenable to that, but what we think is important is that the recall rate be calculated based on looking at all documents that were collected. Because if you only look at the documents that hit on search terms, it doesn't tell you anything about how many responsive documents may still be out there that were not captured by the search terms. So, you know, defendants do not agree to that. We've offered a compromise to defendants. Defendants want to do a 70 percent recall rate if you just focus on the search term universe. We've said we think it's appropriate to look at the total universe. We would agree to, you know, a recall rate of 70 percent for the total universe, or we think the recall rate should be 80 percent if you just focus on the search term universe. So we think we've offered, you know, two amenable compromises that would work, and we would hope, you know, to get the Court's guidance on that issue.

THE COURT: Well, I don't have anything in front of me. I understand the description, and that makes sense. Are

you at the point where you could present that issue to the Court? And what I would suggest would be a single joint letter where, Mr. Thornburgh, you can take first crack at it, explain your position and what you want, and then you can hand it over to Ms. Gushman and she can provide the defendants' response and what they propose. And once again, I'll just pick one of them, or something in between. So are you at a point where you want to put in that joint letter? It can be short and sweet, you know, three pages. And I would handle it the same way that I would handle any dispute on the search terms, meaning you submit it by Wednesday and you'll get an answer next week.

MR. THORNBURGH: That's amenable to plaintiffs, your Honor.

THE COURT: Okay. Ms. Gushman, does that sound good on your end?

MS. GUSHMAN: Yes, that sounds good. Thank you, your Honor.

THE COURT: Okay. All right. So we have two submissions coming in next Wednesday. That should hopefully resolve the search term issues and issues on the recall rate. And any other issues? I'll start with Ms. Gushman. Any issues that you wanted to raise other than those two?

MS. GUSHMAN: Nothing further for defendants. Thank you, your Honor.

THE COURT: Okay. All right. Well, I appreciate

everyone——

MR. WHITE: Your Honor?

THE COURT: Yes. Someone else?

MR. WHITE: This is Brian White for the plaintiffs. I just have two items to flag, if I may.

THE COURT: You may.

MR. WHITE: Thank you, your Honor.

The first one is just the mechanics of implementing your order on the amendment to the protective order. What we would like on the plaintiffs' side is, the existing protective order is 23 paragraphs long. We set up the amendment as paragraph 24, with the idea that it could be cut and pasted into the existing protective order and then issued as an amended protective order. I wanted to ask if that's agreeable to the Court and, if so, would you like for us to do the cut and paste and send it to chambers or handle that some other way?

THE COURT: No, you do it. But I have no issues with that approach. I imagine that the reason is that if you need to convey the terms of the protective order to someone, it's easier to just send them one document as opposed to a document and then an amendment to the protective order. So I think that makes sense. I would appreciate it if you could provide that to the Court. But it would be easier if you do it.

MR. WHITE: Okay. Thank you, your Honor.

The second issue is one that we talked about at the last discovery conference, because you asked about what submissions might be coming up. We've been meeting and conferring over the privilege log that was on the agenda for the last hearing. We had indicated to defendants that we were at an impasse yesterday, but defendants have offered to provide some additional information, so we haven't filed a motion to compel on that. We may not, but we may. If we do, it will be relatively soon.

THE COURT: Okay. And how many documents are we talking about?

MR. WHITE: 18.

THE COURT: Okay. All right. Well, finish up those discussions, and if you reach an impasse, you can certainly file a letter consistent with our individual practices, and at that point, given those 18 documents, the next thing that will happen is that I'll ask the defendants to provide those documents for *in camera* review.

MR. WHITE: Thank you, your Honor.

THE COURT: I think that that clears everything up. I thank everyone for joining today. And thank you, Mr. O'Mara. I know that you're on the West Coast so it's pretty early for you, but thank you for making the time. I appreciate it. And have a good weekend, everyone. We are adjourned.

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